

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

77-4091

To be argued by
CHARLES R. KATZ

United States Court of Appeals
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

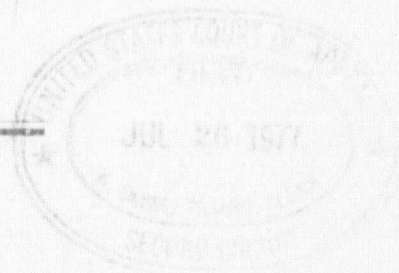
v.

COLUMBIA CORRUGATED CONTAINER CORP.,
Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR RESPONDENT
AND
RESPONDENT'S APPENDIX

CHARLES R. KATZ
Attorney for Respondent
360 Lexington Avenue
New York, New York 10017
(212) 867-9140



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 77 - 4091

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

COLUMBIA CORRUGATED CONTAINER CORP.,
Respondent.

On Application For Enforcement Of An Order
Of The National Labor Relations Board

BRIEF FOR RESPONDENT

STATEMENT OF THE ISSUES PRESENTED:

In addition to the issue set forth in the NLRB's ("Board") brief as to whether substantial evidence on the record as a whole supports the Board's findings, there is also presented the following issues.

Whether the personal, single, isolated act of John Stallworth ("Stallworth"), in refusing to sign the letter of Dec. 11, 1974 waiving his individual right to work the week of Jan. 6, 1975 and instead accepting immediate layoff on Dec. 13, 1974, constituted concerted protected activity within the meaning of the National Labor Relations Act ("Act").

Whether Stallworth's deliberate falsification of the most crucial incidents as to whether or not he had been told to report

to work on January 6, 1975 constituted such an abuse of the Board's process that the complaint should have been dismissed.

STATEMENT OF THE CASE

This case is before the Court upon the Board's application for enforcement of its order. (A.245-248).^{1/} These proceedings involve allegations that Columbia Corrugated Container Corp. ("Respondent" or "Employer") violated Sections 8(a)(1) and (3) of the Act by terminating Stallworth on January 8, 1975.^{2/}

The complaint of unfair labor practices resulted from a charge of unfair labor practices filed by Stallworth on May 16, 1975. The Administrative Law Judge ("Judge") issued his decision on April 26, 1976 after holding hearings on February 2, 3 and 4, 1976. The Judge's decision with certain modifications by the Board was affirmed by the Board on September 27, 1976. (226 NLRB No. 31) The Board's decision found that Respondent had violated Sections 8(a)(1) and (3) of the Act and ordered Stallworth reinstated and that he be made whole for any loss of wages sustained as a result of the alleged discharge. Neither the Judge nor the Board addressed themselves to the issue of abuse of the Board's processes because of Stallworth's deliberate falsifications.

^{1/} "A" references are to the printed Board's Appendix.

^{2/} All dates hereafter referred to will be 1975 unless otherwise specifically indicated.

THE FACTS

A. Background

The Employer and the Union had a peaceful history of labor relations for about 20 years. (A.128) During October 1974 all workers were advised of the usual midwinter plant shutdown from December 22, 1974 through January 5, 1975, and that the plant would reopen on a regular schedule on January 6. (A.129,259) Because of economic conditions around November 15, 1974, the Employer found it necessary to start laying off employees. (A.129) Those employees with less than one year of seniority^{3/} were laid off at that time. (A.130)

B. The Charge and Complaint of Unfair Labor Practices

More than 4 months after Stallworth was terminated he filed on May 16, 1975 a charge of unfair labor practices against his Employer. (A.226(a)) He asserted that since on or about January 6, 1975 the Employer had "failed to recall" him from layoff because of alleged concerted activities.

The complaint (A.227-230) alleges in substance that the Employer in violation of Section 8(a)(1) and (3) of the Act discharged Stallworth on or about January 8, 1975 and failed to reinstate him

^{3/} The Union contract in Article VII (A.255) provides in substance that where layoffs are required due to slack of business, the Shop Delegate or Steward, as he is commonly called, is to confer with the Employer to attempt to share the available work as equally as practicable among employees with at least one year's seniority.

because he individually refused to sign a letter (A.260) waiving a certain provision dealing with work sharing under the collective bargaining agreement between the Employer and the "Union" and because he "engaged in other concerted activity for the purpose of collective bargaining and mutual aid and protection." (A.228-229) The Employer duly filed its answer denying the commission of unfair labor practices. (A.233) After the Board rested, the Judge granted Respondent's motion to strike the above quoted language from the complaint. (A.214)

The NLRB Counsel's ("G.C.") theory of the case was that since on Dec. 11, 1974 Stallworth refused to sign the aforesaid letter (A.260), he was discharged on Jan. 8. She stated that after Stallworth was laid off on Dec. 13, 1974 he "heard nothing until early January 1975, when he received a letter (A.262) saying 'Since you didn't report for work January 6, we assume you quit.' He never as far as he knew, he had not been called back to work. He was waiting to hear." (A.9) As herein-after appears, the evidence clearly indicates Stallworth was terminated because he did not report for work on Jan. 6 as he had been directed to on Dec. 11, 1974 by Mr. Charles Serwitz, President of the Employer ("Serpitz").

C. The Events in the Fall of 1974

It had been customary for the Respondent to have two plant shutdowns each year, one during the summer period and the other normally at the end of the year during the Christmas holiday season. In accordance with this custom, in Oct. 1974 Respondent distributed to its employees a notice that the plant would be closed from Dec. 22, 1974 through Jan. 5, 1975, for the year end shutdown. (A.259)

* The Union is the Folding Box Corrugated Box and Display Workers Local 381, United Paper Workers Int'l. Union, AFL-CIO.

Shortly after the notice to the employees concerning the year end shutdown was distributed, Respondent realized that it would be necessary to "go into a layoff program". Thereafter, the Respondent began to lay off individuals on approximately November 15. Every employee laid off in November had less than 1 year's seniority. (Judge's Decis. 235)

However, business continued to fall off and the Respondent's officials realized that they would have to go further than laying off merely the 1 year people and would have to make additional layoffs. In order to conform to the sharing of work under the Union Agreement,^{4/} the Respondent realized that it would have to go into a work sharing program for the next 30 days. In order to put this program into effect, the Respondent determined the number of individuals who would have to be placed on layoff status in order to reduce the staff to the number that would be needed to operate the business as it was at that point. They determined to fix the number to be laid off at approximately 50 or so of the least senior people and retain approximately 25 to 29 individuals in normal work status. Accordingly, the Respondent divided the approximately 50 least senior people into two groups, according to seniority. These were the individuals who were going to share the work for the next 30 days. (Judge's Decision, A.236)

^{4/} See Footnote 3, supra.

As noted, the people to be placed in the work sharing program were to be divided into two groups, the 25 of whom were the least senior of the 50, and in which less senior group, Stallworth was included. It was determined that under the work sharing plan Stallworth's group would not work the week of December 16, 1974, and would have been scheduled to work the week of December 23, but, nevertheless, would not work due to the end of the year shutdown and would be rescheduled to commence work on January 6, 1975.^{5/}

D. Stallworth's Refusal to Return to Work
On January 6, 1975 as Instructed by Respondent

A number of the employees learned of the planned work sharing and layoff programs. As a result, the night shop steward, R. L. Ridgeway, spoke to Respondent's President, Serwitz, and asked if the men in the least senior group, the group in which Stallworth was included, could be laid off on December 13 without returning on January 6 for a period of approximately only 1 week and then going on indefinite layoff, so that they could immediately apply for un-

5/ The work sharing plan (A.236) was as follows. Employees with less than one year of seniority had been laid off around mid-November 1974. (A.129-130) The next less senior employees, totaling some 50, were divided into 2 groups. (A.132) Stallworth was in the group that had less seniority. The regular work week is 40 hours. (A.191) The work was shared as follows: the work week beginning December 2, 1974 Stallworth and about 80% - 85% of the plant, worked 36 1/4 hours and for the work week beginning December 9, 1974 Stallworth and about 80% - 85% of the plant worked 37 hours. (A.191-192) The work week beginning December 16, 1974 the group in which Stallworth's seniority fell, was to be laid off. (A.133) The plant was shut down the work weeks beginning December 23 and December 30, 1974. The work week beginning January 6, the group which included Stallworth was scheduled to return to work and then at the end of that week, or as of January 13, go on permanent lay off. (A.134)

employment after Dec. 13. Thus, they would benefit from their unemployment insurance and would realize more money thereby than if they were to be laid off, rehired for 1 week, and then be laid off again due to the lack of business. (Judge's Decision, A.236; 135)

Upon receiving this request, Serwitz stated that such modification of the work sharing provision would be agreeable to Respondent provided the Union would agree to it, inasmuch as the Union Steward's request would be contrary to the contract, and Respondent wouldn't agree to such modification without the Union's consent. (A.136) The following evening Ridgeway reported back to Serwitz, that the Union agreed to such modification but each employee would have the individual choice of accepting the layoff or working the week. (A.136,236)

Servitz verified Ridgeway's statement by calling the Union's Business Manager, Mr. Cianciulli, (G.C. Ex. 2, R.A. 1) ,^{*} who verified what Ridgeway had told Serwitz. Cianciulli told Serwitz it was all right to modify the work sharing clause but each of the men was to decide for himself whether he individually wanted to accept immediate layoff or work the week. (A.136) At the request of, and with the Union's consent, there was given to the Union Steward for distribution to each of the employees (including Stallworth) 3 copies of an individual waiver letter - one for the employee, one for Respondent, and one for the Union. (A.136,137,161,236,260) The waiver letter as agreed to read as follows:

* "R.A." references are to Respondent's appendix at the end of the brief.

"December 11, 1974

To: Columbia Corrugated Container Corporation

Dear Sirs:

I have been advised that I am being laid off after work on Friday, December 13, 1974.

Please note that I wish to waive my rights as stated in Article VII of the labor agreement between Columbia Corrugated Container Corporation and the Folding Box Corrugated Box and Display Workers Local 381. Rather than share the work for the first 30 days, I am willing to remain on layoff until work is available and I can return.

Very truly yours,

John Stallworth" (A.260)

Stallworth spoke to Plotkin the day Union Steward about the letter, who in turn called the Union and then told Stallworth that the Union said he didn't have to sign the letter - those that wanted to, it is all right; those that don't "It doesn't make any difference." (A.44-45)

When all the employees except Stallworth had signed the waiver, Serwitz told Stallworth that it was the men's idea and the Union O.K.'d it and he "explain[ed] to him what the waiver meant", that it merely affected the work sharing clause "only for this time." (A.137,151-152). Further, that it was beneficial to the men because they could start collecting unemployment insurance immediately after December 13, 1974, instead of coming back to work on January 6

and then being permanently laid off at the end of that week and then first applying for unemployment insurance. (A.153)

Serwitz further told him that the waiver was for his advantage because he was going to be laid off anyway starting on January 13, after returning to work on January 6. (A.138) When Stallworth indicated that he would not sign, he was told "to return to work on January 6 for one week and consequently thereafter be on permanent lay off"; he was told he did not have to sign and if he didn't, he would return to work on January 6; at that point Serwitz walked away. (A.139,151) There was no screaming or yelling. (A.140,141) Serwitz credibly testified and the Judge so found (Judge's Decision, A.237,239) that on December 11, 1974 he told Stallworth that since he wasn't signing the waiver, he was to report for work on January 6 and would be laid off at the end of that week, as per the original work sharing plan. (A.152,157)

Stallworth testified that he was not told on December 11, 1974 to return to work on January 6. The Judge found that Stallworth was not a credible witness and that he falsified the facts. (A.237, fn. 4; A.239 fn.5)

The Judge analyzed Stallworth's deliberate falsehoods and many inconsistencies in his testimony and capped it off with Stallworth's pretrial investigatory affidavit which "indicate[s] that Stallworth was told to report on January 6. . ." (A.239) Ours is not a case of credibility determined by one man's word against another. Here Stallworth's falsehoods were shown to be deliberate by his own pretrial investigatory affidavit.

The Judge found that Serwitz verbally instructed Stallworth to return to work for one week on January 6. The Judge did not credit Stallworth who claimed that no such instruction was ever given to him.^{6/} (A.237 fn. 4, A.239, fn.5)

Stallworth at first denied that he spoke to Serwitz shortly after he received the Jan. 8 letter (A.270) that advised him he was deemed to have quit because he did not return on Jan. 6. (A.60, 64). The Union was likewise advised. (A.270) On the first day of the hearing Stallworth testified that he didn't speak to Serwitz because Serwitz was in Florida. (A.35-36) On the second day of the hearing, on redirect, he changed his story and said that he did speak to Mr. Serwitz the day he received the letter. (A.104)

On cross examination Stallworth admitted that when he got the Jan. 8 letter he went and saw Serwitz and asked him how he figured that he had quit, (A.60) and that Serwitz told him he "should have known to come back to work on January 6, 1975 and because you didn't come back for 2 days under the 48 hour rule, you were deemed to quit your job. . ." (A.64) There is no record evidence that Stallworth made any attempt to explain, or offered any reason whatsoever, or any extenuating circumstances as to why he did not report for work on Jan. 6, as directed.

6/ Stallworth's unfair labor practice charge (A.226a) asserted that Respondent failed to recall him on Jan. 6. This was a willful false statement. Additionally, when Stallworth applied for unemployment insurance he continued his pattern of deliberate falsehood of this crucial matter. The Unemployment Insurance Referee commented that Stallworth's "sworn and consistent testimony to the fact [was] that he was never notified orally. . . that he should return. . ." (A.263, emphasis supplied) The Judge however found that Stallworth had in fact deliberately lied when he testified at the NLRB hearings that he not been notified orally to return to work on Jan. 6. The Judge further found as a fact that Stallworth had received such oral notification. Respondent did not appear at the hearing. (A.263)

Serwitz was not in Florida and testified that he did talk to Stallworth. (A.144) This is another instance of Stallworth's deliberate falsification.

John Danetra, Vice President of the Union, subpoenaed by the Employer, testified that Stallworth admitted to him that Serwitz had told him to return to work on Jan. 6, but that he would deny Serwitz ever told him to return. (A.185-186)

Danetra testified that Stallworth called him and told him that he had received the company's Jan. 8 letter and Stallworth wanted to know whether the company was right in deeming that he had quit.

(A.185) In pertinent part Danetra stated:

"I asked him if they had -- if they had gotten in touch with him and told him to come back and he said no, that they have not gotten in touch with him and told him to come back, and then, after I spoke to him for a while, he did say that Charley did tell him to come back verbally, but he was waiting to get it in writing.

He didn't think that it was sufficient enough to have it verbally.

Q. And what did he then say to you?

A. Well, he said that if it was a matter of bringing it out, that he would deny Charley ever said it.

Q. He would deny that Charley said what?

A. That he should return to work on a certain date.
(A.185-186) (Emphasis supplied)

Danetra's talk with Stallworth took place a day or two after Jan. 8, on which date Stallworth had received the letter that he was deemed to have quit because of the violation of the 48 hour rule. This was most damaging and devastating evidence against Stallworth since not only did it corroborate Serwitz' testimony to the effect

that he had told Stallworth to report to work on Jan. 6, but it clearly established that Stallworth had decided to and did in fact deliberately falsify on this crucial item.^{7/}

Danetra was not cross-examined by the G.C. The Judge obviously surprised by G.C.'s failure to cross-examine Danetra, asked G.C. whether she had any cross-examination and she requested a moment to consider and then she said "No questions". The Judge evidenced his surprise when he said "No questions?" and the G.C. confirmed by saying "No". (A.186) There is nothing in this record to indicate any animosity whatsoever between Stallworth and the Union and the Union would have no reason to lie.

Later on G.C. on rebuttal recalled Stallworth, who by a series of leading questions denied that he had any such conversation with Danetra. (A.196-197) Thereafter Respondent recross-examined Stallworth. The Judge in commenting on this testimony stated:

"Stallworth admitted on cross examination, that he told the Union official that he should have received a written notice to return to work and not a mere verbal notice. This would be consistent with the conclusion that Stallworth must have received a verbal notice from Serwitz to return to work on January 6." (A.240)

Further instances of Stallworth's deliberate falsehoods are the following. When Stallworth was asked why he waited from January to May to file the charge of unfair labor practices, he said he was waiting for an answer from the Union. (A.74) Yet he admitted

^{7/} The Judge determined that Danetra's testimony was "consistent with the conclusion that Stallworth must have received a verbal notice from Serwitz to return to work on January 6." (A.240)

that when he spoke to the Union official in January, the Union official at that time told him that there was "nothing they can do for me" because Mr. Serwitz was right in that the verbal notice given to Stallworth was sufficient and by not reporting to work on Jan. 6 as required by the Respondent's Rules and Regulations, he was deemed to quit. (A.66-7) Thus, he knew around Jan. 9 or 10 that the Union was unable to do anything for him. While there is no requirement that a charge be filed immediately, this line of questioning dealt with his creditability and established another of the witness' deliberate falsehoods when he said that he had delayed filing the charge because he was waiting to hear from the Union. He had in January already heard from the Union. (A.75) Obviously the Union would do nothing for him because he was prepared to deliberately falsify his testimony.^{8/}

Stallworth testified he had been laid off out of seniority. (A.250) Documentary evidence from the Respondent's payroll records established that Stallworth was not laid off out of seniority and the Judge so found. (A.189,241)

8/ Significantly Stallworth did not file a unfair labor practice charge against the Union for breach of the Union's duty of fair representation in not grieving for loss of his job. Vaca v. Sipes, 386 U.S. 171 (1967); Holodnsk v. Arco Corp., 514 F.2d 2851 (2 Cir. 1975). Obviously he knew that since he had told Danetra he would deny that he was told to report for work, that if he filed a charge against the Union, the Union would tell what he had said and his deliberate falsification would be made public.

With respect to the March incident, McCloud, Respondent's foreman, being informed that Stallworth was unemployed, told one of Stallworth's fellow employees to tell Stallworth to come into the plant and see Serwitz about a job. (A.162) When Stallworth appeared, he spoke to McCloud, who told Stallworth to sit in the cafeteria. (A.163) McCloud went to see Serwitz who reminded him that Stallworth had quit his job because he didn't return to work on Jan. 6 as directed, and that if Stallworth wanted a job "he would have to come back as a new employee." (A.163-164) McCloud then went to the cafeteria and "told him (i.e., Stallworth) exactly" what Serwitz had said, namely, that being that he hadn't returned on January 6 - he had given up his job, . . . and that if he wanted to come back he would come back as a new employee as a headsetter." (A.164) Stallworth said nothing but "he got quite mad." McCloud walked away from him. Stallworth walked out. (A.164)

Although Stallworth denied that McCloud had made any mention in his conversation about coming to work as a new employee, (A.195) the Judge credited McCloud's testimony. (A.241) ("I credit McCloud in this respect.") The Judge just didn't believe Stallworth. (A.195) Stallworth did not state that he was ready to go back as a new employee because the Judge asked McCloud a hypothetical question "What would have happened if Stallworth had said "Yes" he was ready to go back as a new employee?" McCloud said that he would then have reported to Serwitz what Stallworth had said. (A.164-165)

Serwitz corroborated McCloud's testimony. (A.148-149)

Serwitz denied that he had told Stallworth he had given him a hard time and that therefor there was no longer a job for him. (A.150) The G.C.'s cross examination of Serwitz did not concern this item but was limited to one page and dealt only with the explanation which was given to the employees concerning the waiver form. (A.158)

The sole basis of whether or not Serwitz told Stallworth that he had given him a hard time was based on Stallworth's uncorroborated testimony. Against this is not only Serwitz' denials, but the vast amount of record evidence which established that Stallworth deliberately falsified on many crucial issues in the case.

As is hereinafter discussed under Point I, the Judge had no alternative, based on the overwhelming record evidence but to find that Stallworth had deliberately falsified in many crucial respects.

The Judge only credited Stallworth with respect to his March 3 or 4 conversation with Serwitz and emphasized, ". . . I have not in other respects credited Stallworth because I found his testimony to be somewhat contradictory and confusing. . ." (A.240)

Stallworth admitted that Serwitz had pointed out to him the advantage of taking an immediate layoff and getting unemployment insurance rather than having to return to work on Jan. 6 for one week and then being laid off and then first becoming entitled to unemployment insurance. (A.53-54) It was of no advantage to Respondent to have the men take the layoff on Dec.13, 1974. But it was to the men's advantage and it is uncontradicted that it was their suggestion through the Shop Delegate; they wanted to do this because

they would then be eligible for unemployment insurance for the weeks of December 20, December 27 and January 6; whereas, if they did not take a Dec. 13, 1974 layoff, they would first become eligible for unemployment insurance on Jan. 13; thus giving up 4 weeks of tax free unemployment insurance benefits. Stallworth admits that Serwitz was trying to tell him that it would be to his advantage to do so.

(A.54)

The crux of this case is whether or not on Dec. 11, 1974 Stallworth was told that he was to return to work on Jan. 6. The Judge found he was so told. (A.237 fn.4; A.239 fn.5) The Judge further found that Stallworth's layoff "was lawful" (A.241) and when Stallworth did not return to work on Jan. 6 as directed, Serwitz "adhered to the Respondent's Rules and Regulations when, on January 8, 1975 he informed Stallworth that the latter was regarded as having quit by reason of his failure to report to work on January 6^{9/} and his further failure . . . to inform the Respondent as to the reasons therefor." (A.241)

Stallworth was found to have deliberately falsified his entire testimony except in the one incident of March 3 or 4 during which he alleged that Serwitz told him that since he had given him a hard time by refusing to sign the waiver letter, he could not return to work. The nature of Stallworth's testimony on the March incident is discussed under Point I herein.

^{9/} G.C. did not dispute the long time existence or the reasonableness of the 48 hour rule.

E. The Board's Conclusion and Order

We submit that there is not substantial evidence on the record as a whole to support the Board's Decision and Order.

Stallworth was not discharged because of his alleged concerted protected activity in refusing to sign the waiver letter but that he was lawfully discharged, as the Judge found, because he did not return to work on January 6 as he was instructed to. (A.239 fn. 5)

Stallworth's deliberate falsifications in the charge of unfair labor practices, and in his testimony at the trial, as well as in his pretrial Board investigatory affidavit - all critical matters- constituted a clear abuse of the Board's processes and the complaint should have been dismissed. The personal, single, isolated act on Dec. 11, 1974 of Stallworth's not signing the waiver letter did not constitute concerted protected activity. Enforcement should be denied.

POINT I

ON THE RECORD AS A WHOLE THERE IS NOT
SUBSTANTIAL EVIDENCE TO SUPPORT THE
BOARD'S DECISION.

The Board's decision cannot be affirmed unless it is supported by "substantial evidence on the record considered as a whole." Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951), Administrative Procedure Act, 5 U.S.C. §706 (1970). The court must set aside the Board's decision if it "cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." The court reviews the record including that portion which "fairly detracts" from the Board's findings. Id. at 488. To discharge this duty the court must review all of the evidence and not only that which supports the Board's decision. (T.I.M.E. D.C. Inc. v. NLRB, 504 F.2d 294 (5 Cir. 1974), Bon-R Reproductions, Inc. v. NLRB, 309 F.2d 898, 903 (2 Cir. 1962)). NLRB v Grease Co., -F.2d-, 94 LRRM 3197 (2Cir.1

The test of substantial evidence is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences. NLRB v. Columbian Enamelling & Stamping Co., 306 U.S. 292, 300 (1939); Dubin-Haskell Lining Corp. v. NLRB, 375 F.2d 568, 573 (4 Cir. 1967); Riggs Distler & Co. v. NLRB, 327 F.2d 575, 580 (4 Cir. 1963).

Thus, the Board's findings may not rest on "suspicion, surmise, implications or plainly incredible evidence." Amys Industries, Inc. v. NLRB, 457 F.2d 904, 907 (8 Cir. 1972).

"[c]ircumstances that merely raise a suspicion that an employer may be activated by unlawful motives are not sufficiently substantial to support a finding." (NLRB v Ace Comb Co., 342 F.2d 841, 848 (8 Cir. 1965)).

Generally an "employer may discharge the employee for good cause, no cause, or for any reason he chooses, except the employee's union activity." Torrington Co. v. NLRB, 506 F.2d 1042, 1047 (4 Cir. 1974); NLRB v Century Broadcasting Corp., 419 F.2d 771, 778 (8 Cir. 1969). This court in NLRB v Milco, Inc., 388 F.2d 133, 138 (2 Cir. 1968) stated:

"[I]t is equally clear that a discharge for some appropriate reason is not rendered unlawful merely because the employer suffered no sorrow at the departure of a union man. NLRB v Birmingham Publishing Co., 262 F.2d 2, 9 5 Cir. 1958; Local 357 Int'l Brotherhood of Teamsters, etc. v NLRB, 365 U.S. 667, 679-680."

As stated in NLRB v Ace Comb Co., supra:

977 "[O]nce it is determined that disciplinary action is warranted the extent of the action taken is purely within the discretion of the employer, and the Board may not substitute its judgment for that of the employer." (342 F.2d at 847)

The Judge, based on the overwhelming evidence, was forced to find that Stallworth had voluntarily quit his job by not reporting for work on Jan. 6 as he had been directed to, then twisted the testimony and sought to show that Stallworth's failure to report to work on Jan. 6 was used as a pretext by the Employer. To support this pretext theory the Judge commented that there was completely lacking any testimony or evidence that Stallworth had ever been a troublesome or inefficient employee or had ever been previously reprimanded or

disciplined and that the Jan. 8 letter informing Stallworth that he had quit was not signed by someone lower in the Respondent's hierarchy but, rather by Serwitz himself, and that this would seem to be unusual for the President of the Respondent to take the time, the trouble and effort to write such a letter, and that the Rules and Regulations gives the Respondent the discretion to discharge or not to discharge. Furthermore, the Judge commented that Stallworth was the only one who did not sign the waiver letter. He accordingly said that by reason of these factors, that despite Stallworth's violation of the published Rules and Regulations, and his deliberate falsehoods, his failure to return to work on Jan. 6 as directed was used as a pretext to justify his loss of employment. (Judge's Decision A.242)

These facts were not sufficient to support a finding of an alleged pretext and Respondent took appropriate exceptions. The Board agreed with Respondent that there was an "absence of any evidence of disparate treatment," of Stallworth (A.250) and that the other above stated items relied on by the Judge "are of little or no significance." (A.250) With respect to the Judge's reliance on the fact that Serwitz personally signed the Jan. 8 letter, and that Stallworth had never been reprimanded or disciplined, the Board likewise agreed with Respondent's Exceptions and found that the Judge had "placed undue emphasis" on these facts and they were likewise "of little or no significance." (A.250) Thus, the Board said that all of these factors to support an alleged pretextual discharge were of no significance.

The Board relied on the fact that although Stallworth violated the plant rules, the discipline for such violation was discretionary with the Respondent and that the statement attributed to Serwitz by Stallworth (which Serwitz denied), that Serwitz had said Stallworth had given him a hard time, demonstrated that Stallworth's failure to report for work on Jan. 6 was not the true reason for his discharge but was utilized as a pretext.

The Respondent's Rules and Regulations (A.264-269) states in pertinent part:

"This statement of policy is intended to make clear to all persons concerned the principles for which this Company stands by which it proposes to be guided in its Employee relations. Toward this end the following statement of policy, consistently adhered to will reduce the possibility of misunderstanding." (A.265) (Emphasis supplied)

Article II of the Respondent's Rules and Regulations, which have been in existence for many years, provides in pertinent part that:

"Causes for discharge include, but are not limited to, the following:

A violation of any of the following may result in immediate discharge. . . " (A.265-266)

Absent for more than a 48-hour period or longer without notifying the company." (A.267)

The record is devoid of any proof that this 48 hour rule was not fair, nor reasonable nor ever arbitrarily or discriminatorily applied. The Union contract specifically provided that the Employer

had the right to discharge an employee for sufficient and reasonable cause, including but not limited to, failure to comply with the general plant rules. (A.256) This provision of the Union contract requires the Employer to promptly, in writing, advise the Union of any such discharges, which admittedly the Employer did. The contract provision further provides for arbitration with respect to any wrongful discharge and if the arbitrator determines that an employee has been wrongfully discharged, he is to be immediately reinstated without loss of seniority and to be compensated for all time lost. It is most significant that Stallworth never grieved that the application of the plant rules was being used improperly against him.^{10/} National labor policy encourages the use of arbitration in such cases. Steelworkers v Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); Steelworkers v American Manufacturing Co., 363 U.S. 564 (1960); Steelworkers v Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

It is clear that a discharge for some appropriate reason is not rendered unlawful merely because the Employer suffered no sorrow at the departure of the employee. (NLRB v Milco, Inc., *supra*, at page 138).

Accordingly, the Board's reliance on the Rules and Regulations being discretionary is not material nor pertinent to this case.

The Judge in support of the theory that Stallworth had given the Respondent a hard time pointed out that the Respondent was encountering economic problems at the time^{and} was in a position to be

^{10/} See footnote 8 herein.

grateful to any employee who would voluntarily cease his employment to the extent of accepting an indefinite layoff. (A.242) This overlooks (1) the fact that the group which included Stallworth was scheduled to return to work only for one week's work - that being Jan. 6 to 13, 1975, at which time they would in any event all be on a layoff. (A.134) The work week beginning Dec. 16 1974 the group in which Stallworth's seniority fell was to be laid off. (A.133) The plant was completely shut down the work weeks beginning Dec. 22nd and 30, 1974. (A.259) Thus, employees by signing the waiver - not helping by accepting an indefinite layoff since they were going to be on indefinite layoff in any event on and after Jan. 13, 1975. And (2) the additional crucial fact that it was the Union, acting through its Shop Steward and its employees, who initiated and sponsored the idea of waiving the work sharing program and accepting the layoff and becoming eligible immediately for unemployment insurance, rather than having to work one extra week. Thus, the waiver was not for the benefit of the Respondent, but for the employees. Thus the Judge's suggestion, that the Respondent because of its economic problems would be grateful to its employees, is without merit.

The Judge relied on the fact that Stallworth was the only employee who had not signed the waiver. How can the Respondent be blamed for this? Are we to conjecture as to what would have happened if other employees had also not signed the waiver and had not reported to work on Jan. 6? We submit that this is nothing but suspicion and speculation and that there is no substantial evidence in

the record as a whole to show that the violation of the plant rule was used as a means of retaliation.

If Stallworth had reported to work on January 6 as he was directed to do, instead of deliberately falsifying and saying that he was never told to report, he would still be an employee of Respondent.

We submit that when the record is considered as a whole there is not substantial evidence to support the Board's decision and order.

As the court said in NLRB v. Birmingham Publishing Co., 262 F.2d 2, 8-9 (5 Cir. 1958) (cited with approval in NLRB v. Milco, Inc., 388 F.2d 133, 138 (2 Cir. 1968)).

"This court has held that 'the burden is on the Board to prove and not on the employer to disprove the presence of anti-union animus or other prohibited discriminatory motivations in hiring and firing.' (cases cited). We cannot say that the Board has met the burden of proof that Edwards' discharge was 'discriminatorily motivated' or that the Board's finding of unlawful motivation is supported by substantial evidence.

* * * * *

If a man has given his employer just cause for his discharge, the Board cannot save him from the consequences by showing that he was pro-union and his employer anti-union. We have no doubt that the Birmingham Publishing Company was glad to get rid of Edwards. . . We cannot say, and the evidence does not support the conclusion that the Board can say: Edwards was fired because the Company's officials had an anti-union animus against Edwards."

In a discriminatory discharge case "a violation rests upon the motive of the employer in making the discharge, not upon what it appears to have been either to the victim or to the union." NLRB v. Dalton Brick & Tile Corp., 301 F.2d 886, 897 (5 Cir. 1962).

In NLRB v. McGahey, 233 F.2d 406, 412, 413 (5 Cir. 1956), the court said:

"The Board's error is the frequent one in which the existence of the reasons stated by the employer as the basis for the discharge is evaluated in terms of its reasonableness. If the discharge was excessively harsh, if lesser forms of discipline would have been adequate, if the discharged employee was more, or just as capable as the one left to do the job, or the like then, the argument runs, the employer must not actually have been motivated by managerial considerations, and (here a full 180 degree swing is made) the stated reason thus dissipated as pretense, nought remains but anti-union purpose as the explanation. But as we have so often said: management is for management. Neither the Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: It may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids."

An employee does not gain immunity "from discharge simply because . . . he is a union member or adherent." NLRB v. Florida Corporation, etc., 308 F.2d 931, 935 (5 Cir. 1962). "[T]he fact that a worker takes part in protected activity does not insulate him from discharge for legitimate business reasons." NLRB v. Hanes Hosiery Division, 413 F.2d 457, 458 (4 Cir. 1969). "If discrimination may be inferred from mere participation in union organization and activity followed by a discharge, that inference disappears when a reasonable explanation is presented to show that it was not a discharge for union membership." NLRB v. United Brass Works, Inc., 287 F.2d 689, 693 (4 Cir. 1961)

In point is this Court's decision in NLRB v. Grease Co., -F.2d -, 94 LRRM 3197 (1977) where enforcement of a Board order was denied. The Court emphasized that:

"The unfair labor practice charge is thus based largely on [the employee's] uncorroborated report of Davis' [i.e. the employer's] statement that he had been fired for union activities. . .

We are required to uphold a finding by the Board if it is supported by substantial evidence, considered on the record as a whole. . . . We have carefully reviewed the entire record, and have concluded that the Board's ruling does not meet this standard. Accordingly, the order cannot stand."

In our case Stallworth was discredited, by reason of his deliberate falsifications, as to all of his testimony except with respect to the March 1975 incident wherein he alleged that the Employer had told him he had given him a hard time. This uncorroborated statement against the background of all of the other evidence in the record is not substantial evidence to support the Board's Decision and Order. The Union contract gave the Respondent the right to discharge Stallworth for violation of plant rules.

It is inconceivable that Serwitz would have bared his breast to Stallworth and "confessed" to him that the reason there was no job for him was because he had given Serwitz a hard time. It is highly improbable that Serwitz would have volunteered such information when no explanation was required. Especially is this so when Serwitz had already told Stallworth in January that he no longer had a job since he had not advised the Respondent that he was not coming in on Jan. 6, as he had been directed to do and had violated the 48 hour

plant rule. Although Stallworth deliberately falsified and said he had not been told to report on Jan. 6, the Judge, based on the overwhelming evidence to the contrary, decided that he had been so told. In evaluating the record and considering Stallworth's deliberate falsehoods, it is doubtful that Serwitz would have "confessed" to Stallworth that he had discharged him because he had given Serwitz a hard time.

The Judge having been led to the inescapable conclusion that Stallworth's loss of job was "lawful" (A.241) would have been required to take the next step and find that Stallworth was not entitled to reemployment and certainly not to backpay. It appears that the Judge felt sorry for Stallworth since the Judge commented that there was no evidence that Stallworth had been a troublesome employee or had been formerly disciplined and he was troubled because Serwitz personally signed the Jan. 8 letter advising Stallworth that he was deemed to have quit. (A.242) The Board, however, found that the Judge "placed undue emphasis" on these facts and that the fact that Stallworth had never been reprimanded or disciplined was "of little or no significance" in the absence of any evidence by the G.C. of disparate treatment. (A.250)

There was, therefore, only left in this case the fact of whether or not Serwitz did or did not tell Stallworth that he had been given a hard time. Up to this point, the Judge had discredited Stallworth's testimony in all major respects. In order for the Judge to rationalize a ruling to have Stallworth reinstated with backpay, he was forced to rely solely on the uncorroborated testimony

of Stallworth that Serwitz had told him there was no job for him because he had given him a hard time.

Stallworth had given his Employer just cause for his loss of job. The Board cannot save him from Stallworth's own consequences. The Board was in error when it evaluated the Employer's reasons in terms of its reasonableness. If the discharge was harsh, if lesser terms of discipline would have been adequate, the Board argues the Employer must not have been motivated by managerial considerations, but the stated reason is thus dissipated as pretense. The Board cannot second guess the Employer.

We respectfully submit that the evidence supporting the Board's decision is not substantial when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view. The Board's findings are required to be given no more weight than reason would dictate and, in the light of judicial experience, they deserve. Universal Camera, supra. In Bon-R Reproductions, supra, Judge Friendly in his concurring and dissenting opinion stated: "We thus may not properly set aside the portion of the Board's order relating to. . .discharge. But we are equally not obliged to enforce it." (At p. 910)

POINT II

STALLWORTH HAD DELIBERATELY FALSIFIED WHEN HE SAID THAT HE HAD NEVER BEEN TOLD TO REPORT ON JANUARY 6. THIS ISSUE WAS THE MOST CRITICAL ONE. SUCH CONDUCT CONSTITUTED AN ABUSE OF THE BOARD'S PROCESSES AND THE COMPLAINT SHOULD BE DISMISSED.

In vindication of the policy of encouraging candor among persons who seek Board aid in redressing their grievances under the Act, (*Republic Steel Corp. v. NLRB*, 311 U.S. 7,11) the Board has ordered withholding of the remedy in part, as in *Wilson & Co.*, 11 LRRM 2545, or in full, as in *Remington-Rand*, 13 LRRM 2565, depending upon the gravity of the offense. See also *O'Donnell's Sea Grill*, 55 NLRB 828, where all the remedy was withheld when a employee deliberately falsified on the witness stand. (*Clayton-Willard Sales*, 126 NLRB at 1343).

The charge of unfair labor practices filed by Stallworth and the Board complaint which thereafter issued, asserted that in Dec. 1974 Stallworth was not directed to report for work on Jan. 6, 1975 because of his refusal to sign the waiver letter. At the trial before the Judge it developed that in fact Stallworth was directed to report for work on Jan. 6 but since he did not do so, he was going to deny that he was ever told so. If he admitted that he had received a direction to return to work on Jan. 6, there would have been no basis for either his charge or the complaint which thereafter issued.

Our case is not the usual one where two witnesses may give different versions of the same factual situation because differ-

ences may reasonably be expected when truthful witnesses give their version of events. In order for Stallworth and the G.C. to make out a case that he was discriminatorily discharged on Jan. 8, 1975, it was most critical to the G.C.'s case to establish that Stallworth had not been directed to return to work on Jan. 6, as alleged in the charge and complaint. The Judge has carefully analyzed the testimony in the record and from Stallworth's pretrial investigatory affidavit found that Stallworth was indeed told to report on Jan. 6. (A.239 fn.5)

Because of Stallworth's deliberate falsification on this crucial item (as well as others discussed under the Facts herein) we urged both upon the Judge and then upon the Board in our Exceptions that because of such deliberate falsification Stallworth's conduct constituted an abuse of the Board's process and the complaint should be dismissed. Neither the Judge nor the Board made any mention of it nor addressed themselves to this contention.

At the pre-appeal conference before the Court's staff counsel, Respondent's counsel in urging that there was merit to Respondent's refusal to accept the Board's decision, amongst other things, stated that because of Stallworth's deliberate falsification, which constituted an abuse of the Board's process, the complaint should have been dismissed. For the first time in this litigation the Board in its brief herein has addressed itself to the issue of abuse of the Board's process by Stallworth's deliberate falsification. But as the Court stated in Burlington Truck Lines, Inc. v. United States, 371 U.S. 156,168 (1962), we

"may not accept appellate counsel's post hoc rationalizations for agency action. . . "

In adjudicating the petition for enforcement it is a simple but fundamental rule of administrative law,

"[T]hat a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." S.E.C. v Chenery Corp., 332 U.S. 194, 196 (1947).

As this Court said in NLRB v Columbia University, 541 F.2d 922,930 (2 Cir. 1976),

"[A]nd we recognize the corollary to that fundamental proposition that, as the propriety of the agency's action is to be judge solely by the rationale it advances, 'that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action. . . ' Id. at 196-197. See also F.P.C. v Texaco, Inc., 417 U.S.380, 396-97 (1974); N.L.R.B. v Metropolitan Life Ins. Co., 380 U.S. 438,443, 58 LRRM 2721 (1965)."

This Court should not accept Board Counsel's post hoc rationalization for the Board's action.

Our case is not limited to the Judge's credibility findings based on Stallworth's testimony as against Serwitz'. We have the testimony of the Union's Vice President, Danetra, to the effect that not only did Stallworth admit to him the day after he received the Jan. 8, 1975 letter that Serwitz did tell him to come back to work on Jan. 6, but that if it was a matter of bringing it out,

that Stallworth would deny that Serwitz, Respondent's President, ever told it to him. (Danetra's testimony is set forth in this brief at page 11) Danetra's testimony was so devastating that the Judge asked G.C. whether she had any cross-examination and when she said she did not, he was surprised for he said, "No questions?" (A.186)

The Judge completely discredited all of Stallworth's testimony concerning the December and January events (which includes the basic issue of whether or not Stallworth was told to report to report for work on Jan. 6). The Judge said:

" . . . I have credited Stallworth only to the extent of the conversation he had with Serwitz on March 3 or 4, 1975. . . " (A.241)

Not only did Stallworth deliberately falsify on the witness stand, but as part of the Board's pre-complaint investigation, he also deliberately falsified. Stallworth's Board pre-trial investigatory affidavit, shown to Stallworth upon his cross examination, revealed a statement therein wherein Stallworth had told the Board Agent that Serwitz never told him to report back to work on Jan. 6. This statement was stricken from the affidavit and Stallworth maintained on the witness stand that he had not told the Board Agent to strike that portion. The Judge found that Stallworth was lying in this respect and that the fact that the statement had been stricken indicated that Stallworth had been told to report to work on Jan. 6. (A.239)

The Judge, although discrediting Stallworth in practically every respect, completely failed to consider the abuse of the Board's process by reason of Stallworth's deliberate falsifications.

In all major aspects except the item dealing with March 3 or 4, the Judge has resolved all credibility issues in Respondent's favor. The Judge's statement that he believes that Stallworth told Serwitz on March 3 or 4 that Serwitz had given him a hard time with regard to the refusal to sign the waiver in December is contrary to all of the relevant evidence in this case. The Judge supports his contention that he believes Stallworth on this single item based upon the evidentiary rule that it is not uncommon to believe some and not all of a witness' testimony. That rule has no application to the unusual facts in our case. Our case is one where Stallworth deliberately falsified on the very basic fundamental question of whether or not he had been told to report to work on Jan. 6. Since the Judge found that he had been told to report for work and that he did not, then, as the Judge further found, he was deemed to have quit his job.

The Judge found Stallworth to be unreliable as a witness, contradictory in statements where his testimony conflicted with his sworn pre-trial statement, exaggerating and often unresponsive. In various respects Stallworth overemphasized and elaborated on matters which he conceived favorable to his position in this case; didn't give his testimony strictly in accordance with his recollection of the evidence, but shaped his testimony to support his case.

The Board in its brief (p. 17 fn. 7) cites a line of cases and urges that they support the Board's reasoning that discharge for filing meritless charges or because of an employee not telling

the truth is not grounds for denying reinstatement with backpay. The cases cited are cases in which the employee was discharged for filing charges with the Board or because ^{he} had given testimony in a Board proceeding, which constitutes a Sec. 8(a)(4) violation. None of these facts are involved in our case.

In NLRB v. Brake Parts Co., 447 F.2d 503,514 (7 Cir. 1971) the Court refused to enforce a Board order where the employee had deliberately falsified testimony. The Board argues that in virtually every charge of unfair labor practices there is a dispute as to who is telling the truth. However deliberate falsehoods are not found in virtually every case. In Brake Parts, supra, the Board urged since there had been no finding that the employee had deliberately falsified her testimony or was a deliberate perjurer, enforcement should be granted. The court, in denying enforcement, while conceding that the employee had not been branded a deliberate perjurer nor that the Trial Examiner had found in so many words that the employee's testimony was deliberately falsified, nevertheless stated:

"[W]hat the Examiner did was to reject her testimony as to numerous conversations which she had with 3 different company officials. In every instance, he credited the testimony of such officials and rejected that of Hosch (i.e. the employee). Such findings must have been made on the basis that he found her testimony to be false.

That the testimony of Hosch before the Trial Examiner was false is not open to question, and the conclusion is inescapable that it was given deliberately and with knowledge of its falsity."

In Iowa Beef Packers Inc. v NLRB, 331 F.2d 176,185 (8 Cir.

1964) enforcement was denied since:

"The record further demonstrates that Grove gave false testimony at the hearing. Under these circumstances, forfeiture of Grove's remedy is required to serve the policy of the Act, and consequently the Board's order requiring Company to offer Grove immediate employment with back pay is not entitled to enforcement."

In NLRB v Coca Cola Bottling Co., 331 F.2d 181, 184,185 (7 Cir. 1964), the Court in concluding that the Board's findings and order were not supported by substantial evidence stated:

"As to the discharge of Everett E. Dorman, it is true that the Board's finding of fact as to him is based almost entirely on the unsupported testimony of Dorman. There is much in the record to demonstrate that his testimony was untrustworthy."

* * * * *

It is surprising that the Board would accept Dorman's version of hotly contested facts when there was no corroborating evidence to Dorman's statements. Time after time Dorman swore falsely to material matters. We cannot regard such testimony as substantial evidence."

In our case Stallworth's testimony was found, in all instances, except as to the hard time statement, to be not creditable, false, contradictory and confused. See the Judge's comments. (A.237-238 fn.4, 239 fn.5, 240)

POINT III

STALLWORTH'S PERSONAL, SINGLE ISOLATED ACT
OF DECEMBER 11, 1974 DOES NOT CONSTITUTE
CONCERTED PROTECTED ACTIVITY. IT WAS NOT FOR
MUTUAL AID AND PROTECTION.

Stallworth's activity was so patently not for any legitimate union or concerted objective but was instead so obviously for his own personal benefit that his loss of job would not, could not, in fact did not, and was never intended by Respondent to either encourage or discharge membership in the Union and thus was not in violation of the Act. His action had no element of collective activity or contemplation thereof. It was mere griping. NLRE v Office Towel Supply Co., 201 F.2d 838,840 (2 Cir. 1953).

The personal, single, isolated incident involved herein^{11/} deals with Stallworth's individual refusal to sign the letter. Stallworth was "lawful[ly]" laid off on Dec. 13 and Serwitz "adhered to the Respondent's Rules and Regulations when, on January 8, 1975,

^{11/} The letter was a waiver "only for this time", a one shot deal. (A.151-152). It seems clear from the format and wording of the letter that it concerned an individual employee. In fact the form letter had each employee's name typed at the bottom. The letter for Stallworth thus had his name typed at the end. The entire letter is cast in the first person singular throughout. Thus, it states: "I have been advised. . . I am being laid off. . . I wish to waiver. . . I am willing . . . I can return . . . " It is clear that the signing or failing to sign this letter concerns Stallworth exclusively. His is no voice with or for others. Thus Stallworth was not engaged in "concerted activity". See Norfolk Conveyor, 159 NLRB 464,468. This letter was an individual letter and Stallworth did not consult with any other employee, or the Union about signing or not signing it, nor did he seek to enlist the support of any other employees not to sign it. Continental Mfg. Corp., 155 NLRB 255.

he informed Stallworth that the latter was regarded as having quit. . .", the Judge found. (A.241)

G.C. urges that Stallworth by refusing to individually waive the work sharing provision of the Union contract was engaging in concerted protected activity; this despite the fact that Stallworth admitted he was not acting as a spokesman for any of the other workers (A.204-205) and that all the other employees had voluntarily agreed to such waiver.

Activities involving attempts to enforce provisions of collective bargaining agreements may constitute concerted activity. NLRB v Interboro Contractors, 388 F.2d 495 (2 Cir. 1967)^{12/} In our case, however, the work sharing clause had been modified, as Stallworth well knew, and therefore he was not seeking to enforce a contractual provision. Under these circumstances the Interboro rule was not applicable since he was acting for himself. To be "concerted activity" it must at least have ^{the} object of initiating, inducing or preparing for group action. Mushroom Transp. Co. v NLRB, 330 F.2d 683 (3 Cir. 1964)

The gist of Interboro, supra, is that any activity involving attempts to enforce the provisions of a collective bargaining agree-

12/ Contra: NLRB v Northern Metal Co., 440 F.2d 881 (3 Cir. 1971). Cf. NLRB v C & I Air Conditioning Inc., 486 F.2d 977, 979 (9 Cir. 1973) (employee complaints concerning safety and jobsite not concerted activity) because it "was related to an isolated incident". See Mushroom Transp. Co. v NLRB 330 F.2d 683, 685 (3 Cir. 1964) where the court made a penetrating analysis of the nature of concerted activity. ("Activity. . . [i]f its only purpose is to advise an individual as to what he could or should do without involving fellow workers. . . it is an individual, not a concerted activity, and if it looks forward to no action at all, it is more than likely to be mere 'gripping'".)

may be deemed to be for concerted purposes notwithstanding the absence of any overt interest on the part of fellow employees. That case is factually distinguishable. In Interboro there were 2 employees - John and his brother, William Landers. Both of them had complained about a series of violations of the Union contract, such as the employer's failure to require 2 men to work in a team instead of one; the employer's failure to provide protective welding equipment; and to pay a guaranteed 8 hours' pay and expense money and the employer not paying the Union contractual wage rates. Furthermore, the 2 brothers had reported these complaints to the Union and had invoked the assistance of the Union in correcting these violations. (157 NLRB 1298) The Board there found that other employees "were also involved in making the complaints." (157 NLRB 1298) It then addressed itself to the complaints made by John alone, and ruled that they were concerted activities because of the numerous complaints and the fact that they affected the rights of all employees in the unit. (157 NLRB 1298) Significantly, in Interboro, the Board emphasized that the G.C. had made out a case because: (1) the discharged employee had complained on numerous occasions about violations of the contract concerning substantial working conditions; (2) the employer had resented these complaints; (3) the employer contemporaneously refused to give a reason to the employees for their discharge; and (4) the employer's claim of discharge for cause was not sustained because the employer's "proffered evidence was so contradictory as to be unworthy of belief." (157 NLRB 1302)

The Court emphasized that the testimony "shows that on several occasions John was speaking for William and Collins as well as for himself." (p. 499-500) Furthermore, the activity was "not fabricated for personal motives." (p. 500)

Interboro is distinguishable on its facts since Stallworth's activity here did not arise in the framework of an attempt to enforce a clause in an existing collective bargaining agreement, since it was already amended.

While activity of a single employer may be protected in certain circumstances, we submit that the appropriate circumstances are not present in our case.

Since its decision in Interboro, this Court has had an opportunity to explain that case's rationale in NLRB v John Langenbacher Co., 398 F.2d 459,463 (2 Cir. 1968). In Langenbacher, supra, the court emphasized that the employer had gotten involved in union affairs since he felt that the men who worked the late shift should get a higher rate of pay and he felt that the union ought first to be consulted. (p.461) In addition, a group of employees, in the belief that the contract was a sweetheart deal, sought permission from the district court to sue the union officers for breach of their fiduciary duties. (fn. 1 at p.462) In our case there is no such situation.

Stallworth by not signing the Dec. 11, 1974 letter could not have been seeking to enforce the work sharing provision of the Union contract since that clause had already been modified and amended

by the Union and Respondent at the request of the employees and the Shop Steward so that each employee was given the individual choice to decide for himself whether he wanted to get the week's work or take the immediate layoff. It is now well established that during the term of a contract the parties may revise it in whole or in part. Since 1958 the NLRB has so held. Thus in DeLuxe Metal Furniture Co., 121 NLRB 995, 1003-1004, the Board declared:

"The Board believes it best to permit the parties to modify or amend any of the substantive provisions of their contract . . . by mutual consent at any time during its term. . ."

A collective bargaining agreement is:

". . . more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . It calls into being a new common law - the common law of a particular industry or of a particular plant. . . * * * *
'There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement.'"
(Steelworkers of Am. v Warrior & Gulf, N.Co., 363 U.S. 574, 578, 579, 580 (1960))

The Union Steward and the employees initiated the request that the work sharing provisions of the contract be amended for this one time so that they could immediately apply for unemployment insurance after Dec. 13. and not have to wait until Jan. 13. (Judge's Decision A.136) Respondent, agreeable to the requested modification, insisted that the Union, as the party to the contract, would have to

agree to it. The Union Steward later advised Respondent that the Union had no objection to the modification of the work sharing provision but that it would have to be the personal choice of each employee as to whether he would accept immediate layoff or get the one week's work starting Jan. 6.

Respondent verified this with the Union and pursuant to the Union's request, Respondent distributed the individual letter waiver. The Union contract provides that "any interpretation of this Agreement or any adjustment thereunder made by the Union and the Company. . . shall be binding on all employees." (RA 1)

The refusal of Stallworth to sign the Dec. 11, 1974 letter was an individual option for him alone^{13/} in pursuance of the agreed upon amended contractual provision.

The Judge asked G.C. what her theory of the concerted protected activity was and she said that it was Stallworth's refusal to waive the one week's work under the work sharing clause; she was relying on "a single assertion." (A.10-11)

Stallworth's activity was purely personal and in no sense collective activity, since there was not a scintilla of evidence that he was acting in conjunction with any other employee or after consultation with any other employee, or as representative of any other employee, or of any other employee's point of view but his own

13/ Individual griping or complaining is not protected. NLRB v Towel Supply Co., Inc., 201 F.2d 838 (2 Cir. 1953); Southwest Latex Corp. v. NLRB, 426 F.2d 50,56 n.3 (5 Cir. 1970); Hugh H. Wilson Corp. v NLRB, 414 F.2d 1345 (3 Cir. 1969); Indiana Gear Works v NLRB, 371 F.2d 273, 276 (7 Cir. 1966); NLRB v Buddies Supermarkets, Inc., 481 F.2d 714 (5 Cir. 1973).

with respect to the modified clause. Reliance by the Judge on E.E.E. Co. Inc., 171 NLRB 982, is misplaced because there the employee on various occasions was seeking to obtain the correct wages, across the board increase and enforcement of the union shop clause - all benefits spelled out in the union contract.

In the cases cited by the Board the grievances which the employees presented arose prior to their discharge. For presenting them they were discharged. In our case Stallworth terminated himself or quit as the Judge found (A.241) "[B]y reason of his failure to report to work on January 6, [and his] further failure. . . to inform the Respondent as to the reasons therefor."

If, as Stallworth claims, he was discharged because he did not sign the waiver letter on Dec. 11, 1974, wouldn't he have been disciplined on that date or at the end of that week, to wit, Dec. 13, rather than have been told by the Respondent to report for work on Jan. 6, 1975, which was to be the week he was to work under the work sharing program?

Stallworth's refusal to waive the one week's work did not constitute protected concerted activity under Section 7 of the Act. His action was an individual personal one and there was no concerted activity involved and his action had no element of collective activity or a contemplation thereof. See NLRB v Office Towel Supply Co., supra.

The foundation of all the cases dealing with concerted protected activity is that the employee must be attempting to enforce the provisions of the collective bargaining agreement. In our case, the amendment of the clause converted Stallworth's activity into an individual personal choice.

Our case is similar to Continental Mfg. Corp., *supra*, where employees were complaining about the dangerous and dirty conditions of the washroom and the employee in question had written a letter concerning such unsanitary conditions. The Board stated:

"[T]here is no evidence that the criticisms in the letter reflected the views of other employees, nor is there evidence that the letter was intended to enlist the support of other employees. This letter received no support from union representatives." (p.257)

Similarly, in our case, there is no evidence that Stallworth's refusal to waive work sharing reflected the views of other employees (in fact, all other employees had already voluntarily agreed to such waiver) nor is there evidence that his refusal to waive is intended to enlist the support of other employees. Stallworth was acting in his own interest, as the question of whether or not an employee wanted to share the work or accept the layoff was a personal individual matter, and the Union, as the bargaining representative, had agreed that the employees could individually accept or not accept the layoff as against the work sharing.

In order for Stallworth's activity to be protected concerted activity, it must be in a situation "[W]hen the employee makes complaints concerning . . . matters which are embodied in . . . a contract . . . [for then] he is acting not only in his own interest but is attempting to enforce such contract provisions in the interest of all the employees covered under that contract." Roadway Express, Inc., 217 NLRB No. 49, 88 LRRM 1503. (Emphasis supplied)

In our case it was found that modification of the work sharing clause of the Union contract was at the specific insistence and request of the employees and the Shop Steward and that the Union agreed

to it and that all employees, except Stallworth, voluntarily and of their own free will exercised their individual choice of giving up the one week's work they would have had under the work sharing program. Stallworth was merely seeking the week's work which could have affected only himself and no one else. Stallworth's activity, was, therefore, not seeking to enforce a clause in the Union contract but his activity was in connection with his individual option.

Stallworth's action in refusing to sign the waiver letter did not encompass the well being of his fellow-employees. All other employees did not share his interest in not waiving the one week's work. In any event, Stallworth's termination of employment was not as a result of the refusal to waive but because he did not report for work on Jan. 6 as directed.

The Employer must have at least some knowledge that the activity was concerted and was for the purpose of mutual aid and protection. See Burnup & Sims v NLRB, 379 U.S.21,23 (1964) ("§8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct"); NLRB v Office Towel Supply Co., 201 F.2d at 840-843 (2 Cir. 1953); N.L.R.B. v Westinghouse Electric Corp., 179 F.2d 507, 508-509 (6 Cir. 1949); N.L.R.B. v. Buddies Supermarkets, Inc., 481 F.2d 714,717 (5 Cir. 1973) (record must show "that the employee was engaged in concerted activity for the purpose of mutual aid and protection and that the employer had some knowledge of this at the time of the discharge.")

Stallworth's personal, single, isolated act of Dec. 11, 1974 did not constitute concerted protected activity. It was not for mutual aid and protection. The work sharing clause of the Union Agreement had been mutually modified. Each employee was to decide for himself whether to accept the layoff on Dec. 13, 1974 or to come back to work for the week of Jan. 6, 1975, and then be laid off. Since this was an individual employee's choice, for his personal benefit, his loss of job would not, could not, and in fact, did not and was never intended by Respondent to either encourage or discourage concerted protected activity for the mutual aid and protection of the employees. Stallworth's action had no element of collective activity or contemplation thereof. It was mere personal griping.

CONCLUSION

FOR THE FOREGOING REASONS, RESPONDENT
RESPECTFULLY SUBMITS THAT THE BOARD'S
PETITION FOR ENFORCEMENT SHOULD BE DENIED.

Dated: New York, New York
July, 1977

Respectfully submitted,

CHARLES R. KATZ
Attorney for Respondent
360 Lexington Avenue
New York, N. Y. 10017

Richard M. Greenspan
On the Brief

RESPONDENT'S APPENDIX
G.C. EX. 2

Union for such transfer the senior person on each shift given preference for such transfer, provided that they have the seniority to which they may be transferred on the same shift.

The Company shall, upon receipt of a request for a transfer,

All employees on the second shift shall receive a premium of ten cents (10¢) per hour for work done on the second shift and fifteen cents (15¢) per hour for work done on the third shift.

ARTICLE XXXII—

All previous effective rates of pay shall be increased by sixty cents (63.7¢) per hour effective September 1, 1954, and effective September 1, 1955, to forty cents (40¢) per hour, including overtime, receiving more than the regular rate of pay.

ARTICLE XXXIII—

This agreement shall be binding upon the Union and the Company. Any dispute arising out of this Agreement or an amendment to this Agreement between the Union and the Company shall be referred to the Arbitrator, shall be binding upon the Union and the Company, and shall not be subject to individual arrangements.

Union for such transfer, it being understood that the senior person on each respective shift shall be given preference for such change provided, however, that they have the ability to perform the work to which they may be assigned on the changed shift.

The Company shall, wherever practicable, grant a request for a transfer from one shift to another.

All employees on the night shift shall receive a premium of ten cents (10¢) per hour additional for work done on the second shift and a premium of fifteen cents (15¢) per hour additional for work done on the third shift.

ARTICLE XXXII—WAGE INCREASE

All previous effective Schedule "A" rates shall be increased by sixty three and seven-tenth cents (63.7¢) per hour effective September 1, 1974, forty cents (40¢) per hour effective September 1, 1975 and effective September 1, 1976 thirty cents (30¢) per hour, including those employees who may be receiving more than the rate for their job classification.

ARTICLE XXXIII—ENFORCEMENT OF AGREEMENT

This agreement shall be enforced only by the Union and the Company. Any interpretation of this Agreement or an adjustment thereunder, made by the Union and the Company, or awarded by the Arbitrator, shall be binding on all employees. Any individual arrangement between an employee or

group of employees and the Company contrary to this Agreement shall be void and of no effect whatsoever.

ARTICLE XXXIV—DURATION OF AGREEMENT

All of the terms and provisions of this Agreement shall be effective from September 1, 1974 to and including September 15, 1977.

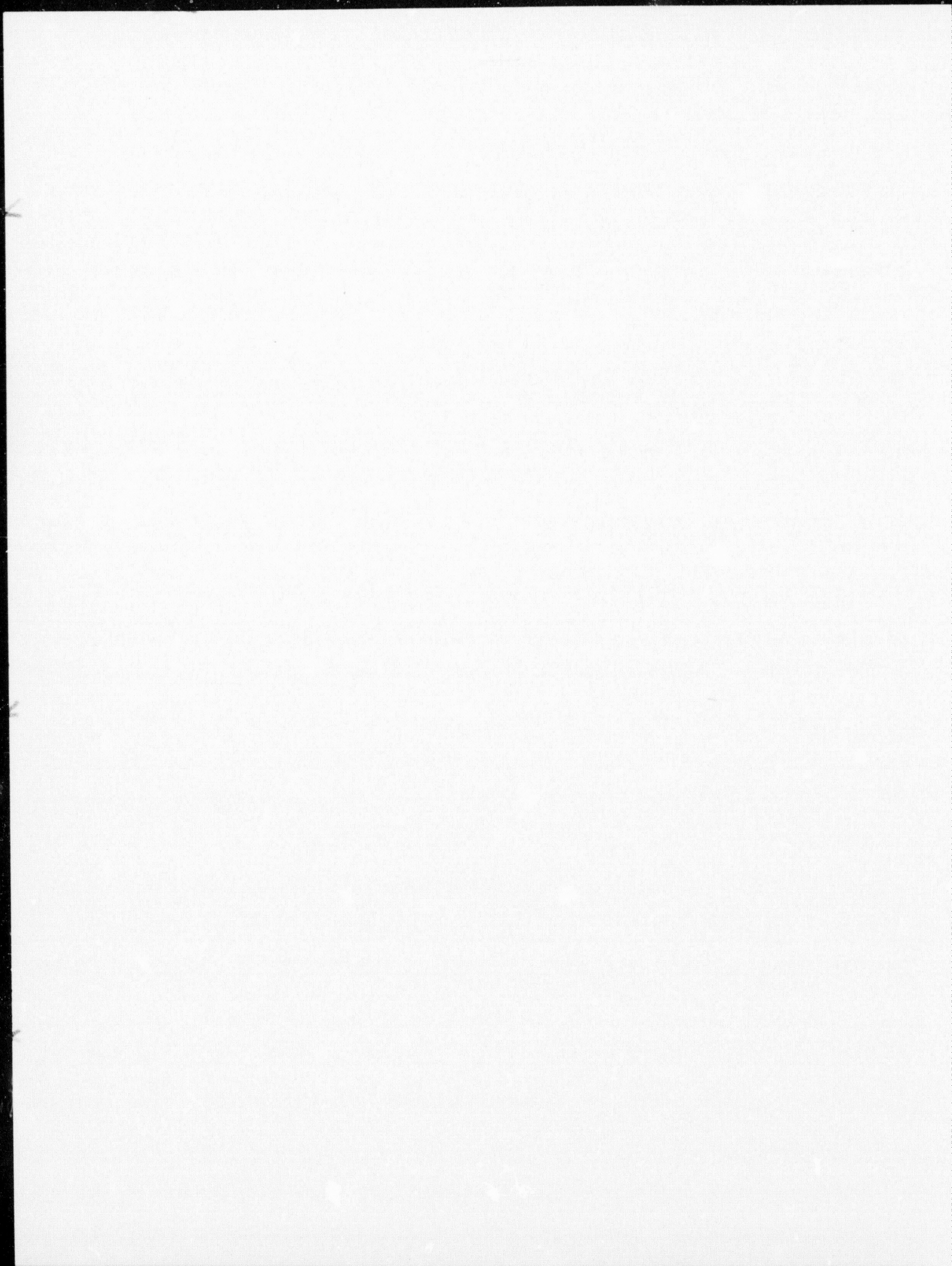
IN WITNESS WHEREOF, this Agreement has been executed by the parties hereto and they have affixed the respective seals and signatures by their duly authorized officers this 9th day of September, 1974.

FOLDING BOX, CORRUGATED BOX &
DISPLAY WORKERS LOCAL 381

By: BERNARD CIANCIULLI, *Bus. Mgr.*

UNITED PAPER WORKERS
INTERNATIONAL UNION, A.F.L.-C.I.O.

By: JOSEPH P. TONELLI, *President*



United States Court of Appeals
for the Second Circuit

National Labor Relations Board,

Petitioner,

v.

Columbia Corrugated Container Corp.,
Respondent.

**AFFIDAVIT
OF SERVICE
BY MAIL**

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Charles Esposito, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 77 Broadway, Malverne, New York
That on July 15, 1977, he served 2 copies of
Brief
on

National Labor Relation Board,
Office of General Counsel,
Washington, D.C., 20570.

by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

Sworn to before me this
15 day of July, 19 77

John V. Esposito
JOHN V. ESPOSITO
Notary Public, State of New York
No. 30-0962350
Qualified in Nassau County
Commission Expires March 22, 1979